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In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY,
Petitioner

v.

B. P. DUNLAP, ET AL.

No. [redacted] 28

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Supporting Brief

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INDEX

	Page
Preliminary Statement	1-3
Brief Statement of the Case	3-6
Reasons for Allowance of Writ of Certiorari	6-15
Certificate	16
Map Following Page	16
Brief	17-57
Statement of Questions Involved	17-19
Proposition I.	
(The deed to J. F. Rogers under Texas decisions passed the land in controversy at all events because it was a roadway and such roadway was not expressly excluded)	19
Authorities	19-21
Statement and Argument	21-33
Proposition II.	
(Under Texas decisions the deed to J. F. Rogers and the lease to Chandler passed the legal title, the grantee being presumptively an innocent purchaser for value without notice, and such decisions establish a rule of property binding upon the Federal Court)	33-34
Authorities	34-35
Statement and Argument	35-38
Proposition III.	
(The decision of the Honorable Circuit Court of Appeals wholly disregards and conflicts with Jones v. Bevier, 59 S. W. (2d) 945, writ denied, and other cases)	38-39
Authorities	39-40
Statement and Argument	40-46

INDEX—Continued

Page

Proposition IV.

(Testimony that the parties did not intend to include the land in controversy in making partition in 1899 under Texas decisions was wholly inadmissible, and in disregarding such cases the Circuit Court of Appeals conflicts with the decisions of this Court in Erie Railroad Co. v. Tompkins and Ruhlin v. New York Life Insurance Company Cases) 46

Authorities 46-47

Statement and Argument 47-49

Proposition V.

(The Honorable Circuit Court of Appeals holds contrary to the Erie Railroad Company v. Tompkins and Ruhlin v. New York Life Insurance Co. Cases) 49

Authorities 49-50

Statement and Argument 50-53

Proposition VI.

(The Honorable Circuit Court of Appeals in effect has granted reformation of a deed executed in 1899 recorded in 1900, and a lease executed and recorded more than four years before the filing of this suit, without pleadings or evidence excusing or explaining the delay in seeking reformation, and in so doing decided an important question of law in a way wholly untenable within the meaning of Paragraph (b), Subdivision 5, Rule 38 of this Honorable Court) 53

Authorities 53-54

Statement and Argument 54-56

Conclusion 57

Waiver of Service 58

LIST OF AUTHORITIES

Page

Amerman v. M. K. & T. Ry. Co.,
182 S. W. 54 ..... 6, 19, 20, 21, 26

Bailey v. Shell Petroleum Corp., 95 S. W.
(2d) 982, writ den. 4, 10, 11, 38, 39, 40, 41, 42, 43
Beck v. Gulf Production Co.,
113 S. W. (2d) 258, writ ref. 21
Bolton v. Dyck Oil Co., 114 S. W. (2d) 299 19
Boren v. Boren, 85 S. W. 48, writ den. 14, 54

Calhoun v. Burton, 64 Tex. 510 ..... 14, 54
Cantley v. Gulf Production Co.,
118 S. W. (2d) 448 ..... 6, 19, 20, 21, 26, 50
Central National Bank v. Barclay, 254 S. W. 140 ..... 14, 53
City of San Saba v. Hudson,
95 S. W. (2d) 1312 ..... 11, 39, 42, 44, 45
Connolly v. Hammond, 51 Tex. 635 ..... 14, 54, 56
18 C. J. p. 166, Sec. 47 43
66 C. J. p. 1129, Sec. 964 46
Corsicana Petroleum Co. v. Owens, 110 Tex. 568,
222 S. W. 154 43

DeArnaud v. U. S., 151 U. S. 483, 38 L. Ed. 244 44

Emde v. Johnson, 214 S. W. 575, writ den. 11, 39, 42
Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.
(C. C. A. 5 Tex.), 279 F. 977 ..... 14, 54, 56
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct.
817, 82 L. Ed. 1187, 114 A. L. R. 1487 ..... 12, 17, 35, 50, 51

Garrison v. Crowell, 67 Tex. 626,
4 S. W. 69 ..... 8, 9, 34, 35, 38, 53, 56
George v. Manhattan Land & Fruit Co.
(C. C. A. 5), 51 F. (2d) 28 43
R. B. Godley Lbr. Co. v. Teagarden, 135 S. W. 1109 ..... 9, 34, 36
Guadalupe County v. Poth, 163 S. W. 1058 20
Gulf Production Co. v. Baton, 108 S. W. (2d)
960, writ ref. 21
Gulf Production Co. v. Warren, 99 S. W. (2d)
616, writ ref. 8, 18, 20, 29, 46, 47, 51
Gulf Sulphur Co. v. Wyman, 221 S. W. 310 19

LIST OF AUTHORITIES—Continued

	Page
Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428	8
Harrell v. United Carbon Co. (C. C. A. 5 La.), 52 F. (2d) 790	10, 34
Haze v. Home Friendly Ins. Co. (Md.), 197 A. 632	44
Heiskell v. Curtiss (App. D. C.), 259 F. 987	11, 40, 43, 44, 45
Hitson v. Gilman, 220 S. W. 140	11, 39, 42
Johnson v. Russell, 220 S. W. 352, writ den.	11, 39, 43
Jones v. Bevier, 59 S. W. (2d) 945, writ den.	4, 10, 11, 38, 39, 40, 42, 43
J. R. Watkins Co. v. Gibbs, 66 S. W. (2d) 355	14, 53
Kelley v. Jackson, 6 Pet. 622, 632, 8 L. Ed. 523	10, 39, 42
Lant v. Manley, 71 F. 7	14, 54
Leath v. Humble Oil & Ref. Co., 223 S. W. 1022	11, 40, 43
Lone Star Gas Co. v. McCullough, 220 S. W. 1114	11, 39, 43
Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360	12, 40, 44
Luna v. Johnston, 11 S. W. (2d) 350	11, 39, 42, 44, 45
Martinez v. Gutierrez's Heirs, 172 S. W. 76, writ den.	14, 54
Mason v. U. S., 260 U. S. 545, 67 L. Ed. 396	12, 35
Massachusetts v. New York, 271 U. S. 65, 93, 70 L. Ed. 838	7
McKay v. Kilcrease, 220 S. W. 177	11, 39, 43
McKay v. Lucas, 220 S. W. 172	11, 39, 43
McKay v. Tally, 220 S. W. 167	11, 39, 43
Mitchell v. Bass, 26 Tex. 372	6, 19, 23, 50
Moss-Tate Inv. Co. v. Owens, 22 S. W. (2d) 1096, writ den.	10, 39, 42, 44
New York Life Ins. Co. v. Seifris (C. C. A. Pa.), 46 F. (2d) 391	11, 40, 43, 44
O'Donnell v. U. S., 91 F. (2d) 14	48, 49
Olcott v. Bynum, 17 Wall. (84 U. S.) 44, 21 L. Ed. 570	48, 49

LIST OF AUTHORITIES—Continued

Page

Paine v. Consumers' Forwarding & Storage Co., 71 F. 626 ..... 7, 18, 20, 21, 26, 30
Parriso v. Towse (C. C. A. 2 N. Y.), 45 F. (2d) 962 ..... 50, 51
Patty v. Middleton, 82 Tex. 586, 17 S. W. 909 ..... 9, 34
Pecos & N. T. Ry. Co. v. Falls, 96 S. W. (2d) 430 21

Quebe v. Gulf C. & S. F. R. R. Co., 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545 ..... 11, 40, 43

R. B. Godley Lbr. Co. v. Teagarden, 135 S. W. 1109 ..... 9, 34, 36
Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391 ..... 6, 8, 18, 19, 20, 21, 26, 27, 47, 50, 51
Ritch v. Jarvis, 64 S. W. (2d) 831 ..... 9, 34, 36
Robertson v. Hefley, 118 S. W. 1159 42
Roxana Petroleum Corp. v. Corn, 28 F. (2d) 168 ..... 30, 32
Roxana Petroleum Corp. v. Sutter, 28 F. (2d) 159 ..... 7, 8, 18, 20, 30, 31
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 ..... 12, 18, 35, 50, 52
Russell v. Beckert, 195 S. W. 607 ..... 11, 39, 42, 44
Ryman v. Petruka, 166 S. W. 711 ..... 14, 54

Shell Petroleum Corp. v. Ward (C. C. A. 5 Tex.), 100 F. (2d) 778 7
Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566 2
Stowe v. Belfast Savings Bank, 92 F. 90, aff. (C. C. A.), 92 F. 100 ..... 11, 40, 44
Swann v. Mills, 219 S. W. 850 ..... 8, 34, 35, 53, 56

Teagarden v. R. B. Godley Lbr. Co., 105 Tex. 616, 154 S. W. 973 ..... 9, 34, 36
Teale v. Schroder, 158 U. S. 172, 39 L. Ed. 938 ..... 14, 54
Texas Bitulithic Co. v. Warwick (Tex. Com. App.), 293 S. W. 160 ..... 6, 19, 23, 50
Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552 ..... 9, 10, 18, 34, 49
Turner Simplicity Manufacturing Co. v. Bremner (C. C. A. 8 Ia.), 40 F. (2d) 368 ..... 50, 51

LIST OF AUTHORITIES—Continued

Page

3 Vernon's Ann. Civ. Stats. 1925, Art. 1728, Pamph. Supp., Acts 1927, 40th Leg., par. 214, ch. 144, Sec. 1 ..... 10, 41, 42
16 Vernon's Rev. Civ. Stats. 1925, Art. 5529 54
Vodrie v. Tynan, 57 S. W. 680 ..... 14, 53

W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. (2d) 27 2
J. R. Watkins Co. v. Gibbs, 66 S. W. (2d) 355 ..... 14, 53
Weiss v. Goodhue, 102 S. W. 793, writ ref. 19, 21
White v. Hix, 104 S. W. (2d) 136 37

In The

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CITIES SERVICE OIL COMPANY,
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v.

B. P. DUNLAP, ET AL.

No._____

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable, the Supreme Court of the United States:

Cities Service Oil Company, a corporation incorporated under the laws of the State of Delaware, respectfully presents this its petition for certiorari to the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit, to such end respectfully showing:

Preliminary Statement

Empire Gas & Fuel Company, a Delaware Corporation, predecessor in interest of petitioner, the owner of an oil, gas and mineral lease and leasehold estate on a part of the Geo. A. Thomason Survey in Gregg County, Texas (which instrument in Texas vests in

the lessee a defeasible fee to seven-eighths of the oil, gas and minerals (*Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; *W. T. Waggoner Est. v. Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27), brought this suit in equity in the District Court of the United States for the Eastern District of Texas, Tyler Division, against B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie Rogers Waskom and her husband, Azie Waskom, and two others, to quiet its title and to remove cloud from title, jurisdiction of the District Court being based on diversity of citizenship, all of the defendants being citizens of states other than plaintiff, the requisite jurisdictional amount being involved, and the property being situated in such division and district. (R. pp. 20-28.) The defendants were claiming a strip of land off the west side of the tract claimed by plaintiff, and filed answer and cross-action asserting title thereto. (R. pp. 28-43.) Empire Oil & Refining Company, a Delaware corporation, was substituted as plaintiff (R. pp. 50-52), and judgment was after a trial rendered for the defendants (R. pp. 52-53); the court filed findings of fact and conclusions of law (R. pp. 58-72), to which such company excepted (R. pp. 73-81), filed request for additional conclusions (R. pp. 81-91) and appealed (R. pp. 299-328); the appeal by order proceeding in the name of Cities Service Oil Company, Empire Oil & Refining Company having by amendment to its charter changed its name (R. p. 93).

On appeal, the case was affirmed (R. p. 340) on written opinion by the Honorable Circuit Court of Appeals for the Fifth Circuit December 8, 1938 (R. pp. 330-339), and petitioner's motion for rehearing (R. pp. 341-364) was overruled January 23, 1939 (R. p. 365), the court delivering a written opinion on rehearing, which was withdrawn for correction and refiled February 24, 1939 (R. p. 364). A second motion for rehearing was heard and considered but overruled February 24, 1939 (R. p. 397), the court correcting on such second motion for rehearing its former opinion. (R. pp. 392-396.) Petitioner, therefore, presents its petition for writ of certiorari to this Honorable Court.

Brief Statement of the Case

Mrs. Louisa Rogers, the common source of title, was deeded the east half of the G. A. Thomason Survey in 1882 (R. pp. 103-104). This was divided between her four sons J. W. Rogers, W. H. Rogers, F. E. Rogers and J. F. Rogers, February 28, 1899, after her death, by the execution of partition deeds (R. pp. 105-109), W. H. Rogers taking tract No. 1 in the northeast corner (R. pp. 107-108), J. W. Rogers and F. E. Rogers taking approximately the south half (R. pp. 108-109) and J. F. Rogers, through whom petitioner claims, taking tract No. 2 in the northwest corner of the half section under a description reading as follows:

"Being a part of the G. A. Thomas Headright Survey, starting at the N. E. corner of Lot No. 2,

which is the N. W. corner of the W. H. Rogers tract, Lot 1;

"Running West 440 yards **to Wiley Davis N. E. corner**; thence South 880 yards; thence East 224 yards; thence North 310 yards at 12 deg. East of North;

"Thence East 754 yards to W. H. Rogers line;

"Thence North 572 yards to starting point containing 68-1/5 acres, more or less." (R. pp. 105-106.)

A map according to the trial court's findings, colored for easy reference, appears following p. 16 hereof.

Wiley Davis owned the land adjoining Mrs. Rogers' property on the west, his northeast corner being marked by a pine knot and a marked pine witness tree (R. p. bottom 201 and top p. 202), and being coincident with her northwest corner.

October 20, 1930, the widow and children of J. F. Rogers, then deceased, to-wit: Mrs. L. J. Rogers, J. E. Rogers, Elvie Waskom and A. S. Waskom, her husband, leased the property to W. P. Chandler by the same description, except that a two-acre tract out of the northwest corner sold to R. M. Wood was excepted (R. p. 139), the lease reciting $10.00 in hand paid, the royalties provided and also an express provision to offset wells within 150 feet of the line (R. p. 142), which recitation and agreement is in Texas sufficient consideration for such a lease or conveyance (*Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ denied; also authorities cited on pages 10-11 of brief). Chandler assigned to Empire Gas & Fuel Company (R. p. 172)

for a recited consideration of $1.00 and other valuable considerations, the receipt for which was acknowledged (R. pp. 172-174), and later the same lessors executed a correction lease to Empire Gas & Fuel Company, the distances being given in feet but intended to cover the same property (R. pp. 162-168).

It was the contention of petitioner that its property extended all the way from the northwest corner of the W. H. Rogers tract on the east to the Wiley Clark northeast corner on the west (excepting the two-acre tract sold to R. M. Wood out of the northwest corner), whereas the defendants claimed a strip of land 68 feet along the west side of the tract which they said was not partitioned in 1899 but left out for use as a road, and that the call for the Wiley Davis corner was made by mistake (R. pp. 35-36). This was denied by petitioner, who also pleaded that the Wiley Davis northeast corner was a fixed and certain point at the time of the partition and thereafter, and petitioner pleaded innocent purchaser in good faith for a valuable consideration as against the claim of mistake (R. p. 45). It was also contended by petitioner that if the strip was in fact a road as defendants pleaded, J. F. Rogers, and petitioner as his remote vendee, would, under Texas decisions, take title thereto under the familiar rule that conveyances bounded by a road will pass title to the road, or so much thereof as is owned by the grantor, subject, of course, to the easement of roadway. Petitioner was not seeking to develop the road for oil production, although defendants were.

The questions presented in this petition for certiorari were duly raised in the trial court by excep-

tions to the court's findings of fact, request for additional findings, and in the briefs and motions for rehearing in the Circuit Court of Appeals.

Reasons for Allowance of Writ of Certiorari

1. The Honorable Circuit Court of Appeals, in affirming the judgment below, wholly disregarded the applicable Texas cases of *Mitchell v. Bass*, 26 Tex. 372; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160, and *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases, which hold that where there is a conveyance of land adjacent to or adjoining a roadway, whether public or private, the road will pass to the grantee by virtue of such deed, unless there is in the conveyance language expressly rebutting such construction, or specifically indicating a contrary intent, (there being no such language in the instant deed, R. pp. 105-106), and it is immaterial in this connection that the road was never opened or that it was abandoned. (*Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Amerman v. M. K. T. Ry. Co.*, 182 S. W. 54.) It was expressly pleaded by defendants that the strip of land in controversy was *"left out by the surveyor at the request of the Rogers family for a road to be jointly owned and controlled by the parties to said partition"* (R. pp. 34-35), and F. E. Rogers, one of the defendants, testified that when Simmons, the surveyor, started surveying off Lot No. 2 (the tract held by petitioner under its lease) at the time of the

partition he came back to the north line and ran over 440 yards and said to them that there was a chain left over there, whereupon his brothers remarked that they would keep that just like it was. *"We were using that for a road at that time of year. We had sold the mill but the road was still there"* (R. p. 22), and again that *"since the division between the heirs * * * a road has been open for the use of anyone who wanted to travel it."* (R. pp. 223-4.) The deed from the other Rogers heirs to J. F. Rogers (R. pp. 105-107) would, therefore, under applicable Texas decisions, have covered and included the whole of the roadway, it being wholly owned by the grantors and grantee, there being nothing in the deed to rebut such intent, even if the call for the Wiley Davis corner, which would have included the road in the description, be disregarded. The effect to be given to and construction of a deed being a question of local law (*Massachusetts v. New York*, 271 U. S. 65, 93, 70 L. Ed. 838, 851; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Shell Pet. Corp. v. Ward* (C. C. A. 5 Tex.), 100 F. (2d) 778), the Honorable Circuit Court of Appeals has, therefore, decided a question of local law in conflict with applicable decisions of the Texas courts, within the meaning of Subdivision (*b*) of Paragraph 5 of Rule 38 of this Honorable Court.

2. The Honorable Circuit Court of Appeals for the Fifth Circuit in so deciding, as set forth in the preceding paragraph, held directly contrary to the case of *Paine v. Consumers' Forwarding & Storage Co.*, 71 F. 626, by the Sixth Circuit, opinion by Judge Taft, and also the decision in the case of *Roxana*

Petroleum Corp. v. Sutter, 28 F. (2d) 159, by the Eighth Circuit, in each of which cases it was held that the conveyance of a tract of land adjacent to a road or right-of-way passed title to such road, in the absence of a clear intent to the contrary.

3. The Honorable Circuit Court of Appeals, in overruling petitioner's assignments of error directed to the admission over petitioner's objection of the testimony of F. E. Rogers, in substance that the strip of land in controversy was left out of the partition intentionally, and in giving effect, by excluding the land in controversy from such deed and lease, to such testimony, wholly disregarded the Texas cases of *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases establishing a contrary rule.

4. The Honorable Circuit Court of Appeals in this case, in denying petitioner's plea of innocent purchaser, wholly disregarded applicable Texas decisions on questions of local law in this: the call in the partition deed to J. F. Rogers and in the lease to W. P. Chandler for the Wiley Davis northeast corner vested in J. F. Rogers in the first instance, and in Chandler (through whom petitioner holds by assignment or conveyance) the legal title to the land in controversy (*Swann v. Mills*, 219 S. W. 850, by the Texas Court of Civil Appeals; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69). The right of the defendants to the strip in controversy was therefore an equity, or at most an equitable title, since the legal title passed by deed to J. F. Rogers and to petitioner from his heirs. In

Texas the ownership of the legal title is attended with a presumption of innocence, good faith and value paid (*Ritch v. Jarvis*, 64 S. W. (2d) 831; *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Turner v. California Co.* (C. C. A. 5 Tex.), 54 F. (2d) 552), the burden being upon the holder of the equitable title to plead and prove that the holder of the legal title had notice of the equity, or was a purchaser mala fide or that a valuable consideration was not paid.[1] The Honorable Circuit Court of Appeals for

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[1]Thus in *Ritch v. Jarvis*, 64 S. W. (2d) 831, it was said:

"* * * Certain defendants held under regular mesne conveyances from S. Jarvis. These defendants are presumptively innocent purchasers. They are the alleged holders of the legal title under regular conveyance from S. Jarvis. Plaintiffs are the alleged owners of the equitable title, in that their cause of action is a suit in equity to set aside the judgment and recover the legal title. When the holder of the equitable title seeks to recover the legal title from a subsequent purchaser thereof, the burden is on him to plead and prove that such holder of the legal title is not an innocent purchaser." (pp. 834-5.)

And in *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973) it was said:

"* * * It is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith. The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase." (135 S. W. 1114.)

In the Supreme Court the same rule was said in this language:

"The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company." (105 Tex. 620.)

the Fifth Circuit itself has held this to be a rule of property in Texas (*Turner v. California Co.*, 54 F. (2d) 552), saying: " * * * As in our opinion a rule of property has been established in Texas as above indicated, we feel bound to follow it. *Harrell v. United Carbon Co.* (C. C. A.), 52 F. (2d) 790 (54 F. (2d) 553)."

5. The Honorable Circuit Court of Appeals in this case in overruling the motion for rehearing wholly disregarded Texas decisions in this: That although the lease to W. P. Chandler, under which petitioner holds, recites a consideration of $10.00 paid, and contains a binding obligation to offset wells on adjoining property within 150 feet (R. p. 142), the Honorable Circuit Court of Appeals held there was no proof of consideration, such holding being in direct conflict with the Texas cases of *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied,[2] *Jones v. Bevier* reciting a consideration of $1.00 and containing the express obligation to drill offsets, as did the lease in the case at bar, and the *Bailey v. Shell Petroleum Corporation Case* reciting $1.00 paid, the court holding such recitation, together with the implied obligation to drill offset well, to be sufficient. The court also disregarded the express holding of the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelley v. Jackson*, 6 Pet.

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[2]Refusal of the writ in these two cases by the Supreme Court of Texas is an approval by such court of the opinion of the Court of Civil Appeals, under the express provisions of Art. 1728, 3 Vernon's Ann. Civ. Stats. of 1925, Pamph. Supp; Acts 1927, 40th Leg., par. 214, ch. 144, Sec. 1.

622, 632, 8 L. Ed. 523); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350, and *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, that the recitation of a consideration paid was sufficient proof of consideration when not rebutted; and there was no rebutting testimony here. It has for many years been settled in Texas that $1.00 is a sufficient consideration for an oil and gas lease such as that held by petitioner. (*Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Company*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ denied. These cases are founded on the Supreme Court case of *Quebe v. Gulf C. & S. F. RR. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545, where it was held that a recital of $1.00 paid was sufficient consideration for a written release of damages for personal injuries.

6. The Honorable Circuit Court of Appeals, in holding that the recital of $10.00 paid in the lease to Chandler was not evidence of the payment of consideration, also conflicted with the Federal court cases of *New York Life Ins. Co. v. Seifris* (C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtiss* (App. D. C.), 259 F. 987; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. (C. C. A.), 92 F. 100, and also disregarded a salutary rule of general effect in the United States

since the earliest times (*Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360), and many cases cited in Note, where it was said that the lease was supported by a valuable consideration "as it recites the payment of $1.00 down. * * * Look back at hundreds of deeds through hundreds of years and you will find them stating $1.00 as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds." (Ann. Cas. 1912B, p. 361.)

7. In failing to apply applicable Texas decisions as set forth in the preceding paragraphs, the Honorable Circuit Court of Appeals for the Fifth Circuit wholly disregarded and refused to apply the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487, and also *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, the latter case applying the rule adopted in *Erie Railroad Co. v. Tompkins* to equity cases, as was in effect done by *Mason v. United States*, 260 U. S. 545, 67 L. Ed. 396.

8. The Honorable Circuit Court of Appeals in this case decided an important question of general law in a way untenable, within the meaning of Paragraph (5) of Rule 38 of this Honorable Court, in that the effect of the holding of the Honorable Circuit Court of Appeals in this case is to grant defendants a reformation of a deed executed in 1899, and a lease executed in 1930, in a suit to quiet title filed by petitioner December 18, 1934 (R. p. 13), the cross action of defendants being filed January 27, 1936 (R. p. 43),

petitioner showing in this connection that the call in the partition deed to J. F. Rogers, petitioner's predecessor in title, dated February 28, 1899 (R. pp. 105-106), for the Wiley Davis northeast corner would have included the strip of land in controversy; that the lease from the widow and heirs of J. F. Rogers to W. P. Chandler, petitioner's predecessor in title, calling for the same Wiley Davis northeast corner was executed October 20, 1930 (R. pp. 138-143); that while defendants pleaded in their answer that the Wiley Davis corner was called for by mistake in the deed, and that such Wiley Davis corner was not fixed or located or susceptible of definite ascertainment at the time, nevertheless F. E. Rogers, one of the grantors in the deed to J. F. Rogers, testified that "I knew where Wiley Davis lives. I knew where the pine tree stood in his northeast corner. It stood out northeast of the school house. I know where the old road jogs around the pine tree. When they cut the road up there the road came almost to the pine tree, I guess" (R. p. 225), and that when Simmons, the surveyor, started to survey off the J. F. Rogers tract he ran over 440 yards and said there was a chain left (R. p. 222), and the answer and cross action was wholly devoid of any excuse for failure to sue to correct the instrument at an earlier date. (R. pp. 28-43.)

Petitioner further shows that the deed to J. F. Rogers from the other heirs of Mrs. Louisa Rogers, dated February 28, 1899, was filed for record in the office of the County Clerk of Gregg County February 10, 1900 (R. p. 105); that the lease to W. P. Chandler was dated October 20, 1930, filed for record in the

office of the County Clerk of Gregg County November 18, 1930 (R. pp. 138-143); that petitioner's original petition was filed December 18, 1934 (R. p. 13), and the answer and cross action was filed January 27, 1936 (R. p. 43). Under the statutes of limitation of the state of Texas (Art. 5529, 16 Vernon's Rev. Civ. Stats. of 1925) an action to reform a deed must be brought within four years after the cause of action accrued, and the Texas courts hold that parties grantor in a deed are affected with notice of a mistake in the description upon the recordation thereof. (*J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tyman*, 57 S. W. 680; *Martinez v. Gutierrez's Heirs*, 172 S. W. 766, writ denied; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ denied; *Ryman v. Petruka*, 166 S. W. 711. See also *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172, 39 L. Ed. 938.)

In this connection also the doctrine of equitable laches applies in Texas to such situation. (*Connally v. Hammond*, 51 Tex. 635; *Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.* (C. C. A. 5 Tex.), 279 F. 977.)

Counsel for all respondents except J. B. Parker and Curtis M. Willock are Hon. Angus G. Wynne and Hon. W. A. Wade, who reside at Longview, Gregg County, Texas, and Hon. Cecil N. Cook of Houston, Texas, is attorney for such respondents Parker and Willock; all of whom have been duly served with copies of this petition and the record therein, as evi-

denced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief, hereto annexed, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding such Honorable Court to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this Court, and that this cause be reviewed and the manifest errors of the Honorable Circuit Court of Appeals be revised and corrected, as provided by law; that upon hearing by this Honorable Court the judgment below be reversed, and petitioner's title to the land in controversy be quieted, the clouds cast upon its title by the claims of the defendants be removed, and that such further proceedings be held herein as may be provided by law and equity.

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THE STATE OF TEXAS }
COUNTY OF TARRANT }

DAVID B. TRAMMELL, being duly sworn, says that he is of counsel for CITIES SERVICE OIL COMPANY, a corporation, petitioner, in the foregoing petition for certiorari; that he prepared the foregoing petition for writ of certiorari and that the allegations therein are true and that there is just cause for same as he verily believes.

DAVID B. TRAMMELL.

SUBSCRIBED AND SWORN TO before me this the 27th day of March, A. D. 1939.

MARY RUTLEDGE,
Notary Public in and for
Tarrant County, Texas.

In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY
Petitioner

v.

B. P. DUNLAP, ET AL.

No._____

Brief in Support of Petition for Certiorari

May It Please the Court:

Of the numerous propositions urged in the Honorable Circuit Court of Appeals, petitioner deems but the following to come within the provisions of Paragraph 5 of Rule 38 of this Honorable Court, viz:

1. Disregarding for the moment the call for the Wiley Davis northeast corner, it is certain that at all events the land described in the deed from W. H. Rogers et al. to J. F. Rogers, petitioner's predecessor in title, would go to and be bounded by the road, which F. E. Rogers, one of the heirs, testified ran along the strip of land in controversy, and the title of the grantors passed to the grantee under Texas decisions, it being the rule in Texas that title to the roadway under such circumstances passes to the grantee unless expressly reserved in the instrument; and in disregarding such applicable Texas decisions, the Honorable Circuit Court of Appeals departed from the salutary rule established by this Honorable Court in the cases of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187,

114 A. L. R. 1487, and Ruhlin v. New York Life Ins Co., 304 U. S. 202, 82 L. Ed. 1290.

2. In so holding, the Honorable Circuit Court of Appeals in this case departed from the rule announced in Paine v Consumer's Forwarding & Storage Co., 71 F. 626, by the Sixth Circuit, opinion by Judge Taft, and the case of Roxana Pet. Corp. v. Sutter, 28 F. (2d) 159 by the Eighth Circuit, each of which cases hold to the same effect as the Texas cases referred to.

3. The Honorable Circuit Court of Appeals in overruling petitioner's assignments of error directed to the admission over petitioner's objection of the testimony of F. E. Rogers, in substance that the strip of land in controversy was left out of the partition intentionally, and in giving effect, by excluding the land in controversy from such deed and lease, to such testimony wholly disregarded the Texas cases of Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ refused; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases establishing a contrary rule.

4. In denying petitioner's plea of innocent purchaser, the Circuit Court of Appeals disregarded applicable Texas decisions which hold that the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, the burden being on the holder of the equitable title to show the contrary, and the decision being therefore directly contrary to the Erie and Ruhlin Cases above cited. The Fifth Circuit itself held such Texas rule as to the holder of the legal title to be a rule of property in Turner v. California Co., 54 F. (2d) 552.

5. The decision of the Honorable Circuit Court of Appeals also decides an important question of general law in a way untenable in this: That the effect of the decision is to grant reformation of a deed executed in 1899, recorded in 1900, and of a lease executed and recorded more than four years prior to the filing of this suit by petitioner, by eliminating therefrom

the call for the Wiley Davis northeast corner (which would have included the land in controversy), without any excuse for the delay in one instance of over thirty years, and in the other instance of over four years, in asking such relief.

These questions will be discussed in order.

I.

The land described in the deed from W. H. Rogers and the two other sons of Mrs. Louisa Rogers, deceased, to J. F. Rogers, the fourth son, petitioner's predecessor in title, certainly went to and was bounded by a roadway, if the call for the Wiley Davis northeast corner (which would have included the road), be disregarded. Such being true, and there being no language in the deed indicating a contrary intent, under the settled rule in Texas the fee to the road passed to J. F. Rogers, and on to petitioner, subject only to the easement of roadway.

(*a*) There being no language in the deed to the contrary, the grantee took the fee to the roadway, burdened only with the road easement:

Mitchell v. Bass, 26 Tex. 372.
Cantley v. Gulf Production Co., 118 S. W. (2d) 448.
Texas Bitulithic Co. v. Warwick (Tex. Com. App.), 293 S. W. 160.
Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, cert. den. 288 U. S. 603.
Bolton v. Dyck Oil Co., 114 S. W. (2d) 299.
Weiss v. Goodhue, 102 S. W. 793, writ ref.
Gulf Sulphur Co. v. Wyman, 221 S. W. 310.

Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ ref.

Guadalupe County v. Poth, 163 S. W. 1050.

Amerman v. M. K. & T. Ry. Co., 182 S. W. 54, writ refused.

(*b*) And it is immaterial so far as the title is concerned, that the road was never opened or that it was abandoned.

Amerman v. M. K. & T. Ry. Co., 182 S. W. 54, writ denied.

Cantley v. Gulf Production Co., 118 S. W. (2d) 448.

(*c*) Under Texas decisions parol evidence to show that it was not the intention to include the roadway is inadmissible.

Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ ref.

Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080.

(*d*) The same rule has been announced by at least two Circuit Courts of Appeal of the United States.

Paine v. Consumer's Forwarding & Storage Co. (C. C. A. 6 Ohio), 71 F. 626.

Roxana Pet. Corp. v. Sutter (C. C. A. 8 Kan.), 28 F. (2d) 159.

(*e*) The rule is applicable to alleys and private ways.

Weiss v. Goodhue, 102 S. W. 793, writ ref.
Guadalupe County v. Poth, 163 S. W. 1050.
Pecos & N. T. Ry. Co. v. Falls, 96 S. W. (2d) 430.
Paine v. Consumer's Forwarding & Storaging Co. (C. C. A. 6 Ohio), 71 F. 626.

(*f*) Such rule applies to partition deeds as well as other conveyances.

Amerman v. M. K. & T. Rw. Co., 182 S. W. 54, writ ref.
Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080.
Cantley v. Gulf Production Co., 118 S. W. (2d) 448.

(*g*) The presumption obtains that the whole of the land is partitioned unless a portion thereof is expressly excepted.

Gulf Production Co. v. Baton, 108 S. W. (2d) 960, writ ref.
Beck v. Gulf Production Co., 113 S. W. (2d) 258, writ ref.

STATEMENT

Mrs. Louisa Rogers owned in fee simple the east half of the G. A. Thomason Survey in Gregg County, Texas, along the west side of which the strip in controversy is located. She died intestate prior to February 28, 1899, and on that date her four sons divided the land, W. H. Rogers taking tract No. 1 in the

northeast corner; J. W. Rogers and F. E. Rogers the south half, approximately, and J. F. Rogers the tract out of the northwest corner heretofore described in the petition for certiorari, which began at the northwest corner of the W. H. Rogers tract No. 1 and then ran west to the Wiley Davis northeast corner, Wiley Davis owning the land immediately adjoining Mrs. Rogers' land on the west at that place. (Court's Findings, paragraphs 3 to 6, R. pp. 60-62.) The attached exhibit, compiled from the court's findings (pp. 16-17), shows the various tracts, being colored for purpose of more clearly showing the situation of the various tracts.

Wiley Davis' northeast corner was marked by a pine knot and a marked pine tree (R. p. 201). F. E. ROGERS, one of the grantors in the deed to J. F. Rogers, who went with the surveyor Simmons when the land was subdivided (R. p. 220) testified that "I knew where Wiley Davis lived. **I knew where the pine tree stood in his northeast corner.** It stood out northeast of the school house. I know where the old road jogged around the pine tree. When they cut the road up there the road came almost to the pine tree I guess." (R. p. 225.) Over objection of petitioner, F. E. Rogers further testified that when Simmons started surveying off Block No. 2, the J. F. Rogers tract, he came back to the north line and ran over 440 yards for the 80 acre marker, and said " 'Boys, you have got a chain left over there' " and my two older brothers said we will just keep that like it is. **We had been using that for a road at that time of year. We had sold the mill but the road was still there. That is at**

the northwest corner. (R. p. 222.) **"Since the division between the heirs and the establishment of the 440 yd. corner at the north and the establishment at the corner where the gearwheel is located, a road has been open for the use of anyone who wanted to travel it."** (R. pp. 223-224.)

J. E. SPORT, a witness for defendants, who owned the tract of land adjoining the Wiley Davis land on the north (R. p. 37) knew of the pine tree at the Wiley Davis northeast corner and the road running along the west line of the Rogers tract (R. pp. 238-239).

Under such circumstances, the settled rule in Texas is that the conveyance to J. F. Rogers passed title to the road.

The rule was thus stated by our Supreme Court in the case of *Mitchell v. Bass*, 26 Tex. 372, decided in 1862, the court saying:

> **"The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant.** The owners of the land on each side, go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (p. 380.)

In *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160,

by the Commission of Appeals, the court construed a deed running to a stake in the west line of the street and thence north 23-3/4 east with the west line of the street to another stake in the line of the street to vest title in the grantee to the center of the street, the court quoting approvingly the language of *Mitchell v. Bass*, supra, and saying:

"The language just quoted has been frequently followed by our Courts of Civil Appeals. See Lewis v. Roach-Manigan Paving Co., 184 S. W. 680; Waples-Painter Co. v. Ross, 141 S. W. 1027; Bond v. Texas & Pacific Railway Co., 15 Tex. Civ. App. 281, 39 S. W. 978; Emerson v. Bedford, 21 Tex. Civ. App. 262, 51 S. W. 889; Cannon v. Healy Construction Co., 242 S. W. 526; Wiess v. Goodhue, 46 Tex. Civ. App. 142, 102 S. W. 797.

"The Court of Civil Appeals, in the instant case, makes an effort to distinguish this case from other Texas cases, on the ground that the lien herein describes the lot by metes and bounds, and runs along and with Monroe street. In other words, the contention is that, since the lien does not expressly call to the center of the street, it must be assumed that the lien was not to extend to property beyond the line of Monroe street. But, a careful review of the Texas cases will show counsel for plaintiff in error to be correct in their statement as follows:

" 'As seen by these cases, the Texas courts hold the fee passes under various assortments of descriptions—some by lot and block number of a dedicated plat and subdivision; some by lot numbers on an undedicated street according to a mere

plat in the deed, by a description calling for a country road in unplatted and undedicated section, and by a description by metes and bounds, which did not include within its limits the highway in controversy.'

"It seems that the Court of Civil Appeals in the case at bar, would have reached a different conclusion had this lot been referred to by lot and block number and not described by metes and bounds which merely called for the line of Monroe street. Counsel for defendants in error, in oral argument, said this was the true test. We submit that this view is erroneous. As already shown, we think the Courts of Civil Appeals in Texas have held differently. In 9 C. J. p. 201, we find the contrary doctrine stated as follows:

" '*The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.*'

"We think the weight of the better reasoned authorities in other jurisdictions is contrary to the decision of the Court of Civil Appeals herein. **We are of the view that the correct rule was referred to by Chief Justice Wheeler in the Bass Case, supra, when he said that title extends to the center of the street unless the express terms of the grant show a contrary intention.** A very thoroughly considered case upon this point is that of Bowers v. Railway Co. by the Supreme Court of Kansas reported in 119 Kan. 202, 237 P. 913, 42 A. L. R. 229. In that case, the court said:

" 'This court has approved the doctrine that to

exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by express declaration, or equivalent of express declaration, in the instrument.'" (pp. 162-3.)

In *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, by the Court of Civil Appeals for the Sixth District of Texas, the deed described the land as "beginning 30 feet west of the northwest corner of Lot No. 2, a stake in Rabbit Creek; thence south 25 east keeping 30 feet from Lot No. 2 for a road reservation 750 varas to the northeast corner of Lot No. 4," the heirs of John Douglas, the grantor, sued to recover title to this 30 ft. strip, but recovery was denied, the court holding, following *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391; *Amerman v. M. K. & T. RR. Co.*, 182 S. W. 54; *Paine v. Consumer's Forwarding & Storage Co.* (C. C. A. 6 Ohio), 71 F. 626, and other authorities, that title to the entire road passed to the grantee, saying:

"Douglass acquired a ten-year limitation title to the whole 30-foot strip, and title to the West half of the strip by virtue of the conveyance to him of Lot No. 5. When he and his children conveyed this lot off, this 30-foot strip was situated upon the eastern edge of his land then conveyed by him. He owned no land on further to the East of the strip.

"So, construing said deed in the light of the presumption herein discussed, **and the conveyance containing no words of specific description to show a contrary intent,** the judgment of the

trial court denying appellants a recovery of the 30-foot strip is affirmed." (p. 451.)

In the course of its opinion the court further said:

" * * * *And it is also immaterial, so far as the title is concerned, that the road was never opened or that it was abandoned.* Amerman v. Missouri, K. & T. R. Co., Tex. Civ. App., 182 S. W. 54." (p. 450.)

Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 351, called for construction of a partition deed. There a tract of fifty-two acres out of the John Douthit Survey in Jefferson County, Texas, had been subdivided, the plat of the subdivision attached to the partition deeds showing the various tracts to abut on a railroad right-of-way and not to include the same. It was there contended that because the partition deeds called for the lot as described on the plat, and the plat did not show such lots to include the railroad right-of-way, that the right-of-way did not pass by the deed. This was denied, the court saying:

"Plaintiffs in error vigorously assert that the plat must be considered as a part of the deed, as it furnishes the only description by which the partition was effected; that when the plat is examined it is found that the distances shown thereon are such as to stop the lines of the lots fronting on the railroad at the exterior line of the right of way. It is further asserted that the specific acreage marked on each lot can only be arrived at by a computation of the area exclud-

ing the right of way. In the light of these facts, it is argued that for the court to extend the distance of the lines running to the right of way beyond their indication on the plat would be to make a different division of this land than that which the parties have made for themselves.

"The law books are replete with instances where the courts have disregarded specific and particular calls in a deed, and so construed the same as to pass the title to land not included in the boundaries of such field notes when such construction was necessary to effectuate the clear intention of the grantor as manifested by language used in other portions of the deed. This is well illustrated in a case where a beginning call of a description of land in a deed runs in exactly the opposite direction from which it was intended by the grantor, resulting in no part of the land intended to be conveyed being covered by the metes and bounds description in the deed. Under such circumstances, where the grantor has in other portions of the deed clearly indicated the particular tract of land intended to be conveyed, the court effectuates such intention by giving the beginning call in the deed an opposite course. The result of this interpretation is to construe the deed to pass title to land, none of which is situated within the boundaries of definite and specific field notes. In such instance the plainly expressed intention of the grantor is not permitted to be defeated, but is made effective." (50 S. W. (2d) 1087-8.)

Previously in its opinion the court had said:

"At the outset it may be said, if defendants in error are correct in their proposition of law, that

the same legal presumption which applies to the conveyance of land abutting on a public highway, street, or stream, is applicable to a railroad right of way, then it necessarily follows that the partition deed between Hebert and the Chaison heirs as well as the deed from Hebert to Weed must be construed to pass the title to the center of the railroad right of way, as neither of said deeds contained any express reservation of the land included in the railroad right of way. **The fact that it appears from the plat that the lines of the lots fronting on the railroad stop at the exterior line of such right of way is not of itself sufficient to exclude the conveyance of the title to the center of the railroad.** It was expressly so determined in the case of Texas Bitulithic Co. v. Warwick, 293 S. W. 160, 162, in which the Commission of Appeals quoted with approval the doctrine announced in Corpus Juris (9 C. J. p. 201), as follows: **'The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact that the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.'** " (50 S. W. (2d) 1084.)

It is also the rule that parol evidence is not admissible to show that the parties intended to reserve or except the fee to the roadway. This is expressly held in *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused, where it was said that:

" * * * The language of the lease was not ambiguous; its legal significance was perfectly clear; **therefore, parol evidence to the effect that 'Mr. Cartwright, prior to the execution of the lease in**

question, went upon the ground and specifically pointed out the tract to be covered by the lease, which designation did not include the railroad right-of-way tract,' was not admissible, but if received, was without probative force in the construction of the lease. 18 C. J. 252. This rule was given controlling effect by the Commission of Appeals in the Rio Bravo Case." (p. 626.)

The Texas cases are in accord with the case of *Paine v. Consumer's Forwarding & Storage Co.*, 71 F. 626, by the Sixth Circuit, Judge Taft delivering the opinion; *Roxana Petroleum Corp. v. Sutter*, 28 F. (2d) 159, and *Roxana Petroleum Corp. v. Corn*, 28 F. (2d) 168. In the *Paine* case there was a conveyance of a lot by number as shown on the plat, the plat describing such lots by dimensions which did not include any part of Water Street. Such conveyance was made after the vacation of the plat, but Judge Taft held that nevertheless the conveyance included Water Street to the center line thereof, saying:

"* * * *It is well settled that where a grantor bounds the lot conveyed on a described street, and is the owner of the land embraced therein, he is estopped to deny the right of the grantee to use the land for street purposes whether it be in fact a street or not.* Thomas v. Poole, 7 Gray, 83; Rodgers v. Parker, 9 Gray, 445; Stetson v. Dow, 16 Gray, 373; Emerson v. Wiley, 10 Pick. 310; Cox v. James, 45 N. Y. 562; Dawson v. Railroad Co., 15 Minn. 136 (Gil. 102); 3 Washb. Real Prop. (5th Ed.), *467, *635, *671; Devl. Deeds, Sec. 1027. *And the same effect is given to a deed describing the lot conveyed by number*

and reference to an undedicated plat upon which the lot is shown to front upon a street. In such a case the easement which the grantee acquires is not limited to that part of the described street in front of his lot, but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed. Rodgers v. Parker, 9 Gray, 445; Thomas v. Poole, 7 Gray, 83; Cox v. James, 45 N. Y. 562. *It is quite true that it has been held that such a deed does not bind the grantor to open and maintain a street in a condition fit for travel* (Hennessee v. Railway Co., 101 Mass. 540); *nor does it imply a covenant that the street is in such a condition when the deed is made. The only effect is that, as between the grantor and grantee, the latter may do nothing inconsistent with this right. Between them, therefore, it is a street. Nor does it prevent this result that the plat was marked vacated, or that in some of the deeds it was referred to as vacated. The vacation of the plat affected only the public easement. It did not conflict with the use of the street as a common way by all the abutting lot owners.*" (pp. 628-9.)

In *Roxana Petroleum Corp. v. Sutter*, 28 F. (2d) 159, by the Eighth Circuit, the lots in question had been subdivided by a plat with an alley running back of the lots, but long prior to the conveyance to Adolph Blank such plat had been vacated. Blank subsequently conveyed the east half of lots 87 and 88 and it was contended on the one hand that such conveyance did not vest title in half of the alley, but only the lots themselves, and on the other that the conveyance carred title to one-half of the alley, although the plat

had long theretofore been vacated. The court concluded that Blank's deed conveyed one-half of the alley, saying:

> "In stating the rule for construing the description in such deeds, the Kansas court further said:
>
> " 'Defendant says Baldwin's deed disclosed no intention to convey half of the highway. This is not the interpretative test. **The test is whether the deed expressed intention to exclude half the highway from the grant.**'
>
> "See, also, Tousley v. Galena Mining & Smelting Co., 24 Kan. 328; Challiss v. Depot & R. Co., 45 Kan. 398, 25 P. 894; A., T. & S. F. Ry. Co. v. Patch, 28 Kan. 470; Paine v. Consumers' F. & S. Co. (C. C. A. 6), 71 F. 626." (28 F. (2d) 162.)

This case was followed by the same circuit in *Roxana Petroleum Corp. v. Corn*, 28 F. (2d) 168, where the lessor leased for oil and gas land described as "Out-lot 9, west division of Oxford, except that part of out-lot 9, west division, theretofore deeded to Wichita Midland Valley Railroad Company for right of way," and the court held that such exception was not sufficient to reserve in the lessor the oil and gas in and under the right of way land, but that it passed to the lessee under the rule herein urged, the court saying:

> "We held in Roxana Petroleum Corporation v. Sutter et al. (No. 8090; opinion filed July 30, 1928), 28 F. (2d) 159, that when the owner conveys a tract of land abutting on a railroad right

of way tract in which such grantor owns the servient estate and the railroad the dominant estate for right of way purposes, his conveyance passes to his grantee such servient estate, unless the intention not to do so be clearly indicated, and we further held that, under the Kansas authorities, the rule applied to an oil and gas lease. See Bowers v. Atchison, T. & S. F. Ry. Co., 119 Kan. 202, 237 P. 913, 42 A. L. R. 228; Cushenbery v. Waite-Phillips Co., 119 Kan. 478, 240 P. 400.

"*Did the exception in the oil and gas lease clearly indicate an intention to except therefrom the oil and gas in the tract of land in and across which Buffington had theretofore conveyed a right of way to the railroad company?*" (p. 170.)

The court then proceeded to hold that such exception was insufficient to reserve in the lessor the oil and gas in and under such right of way.

It seems plain therefore that the Honorable Court of Civil Appeals has held contrary, not only to Texas decisions, but also to decisions of other Circuit Courts of Appeals.

II.

Since the conveyance to J. F. Rogers, calling for the Wiley Davis northeast corner, which included the strip of land in question, passed to J. F. Rogers the legal title thereto, and such legal title by mesne conveyances vested in petitioner, petitioner was under applicable Texas decisions presumptively an innocent purchaser for value and good faith, and the burden

rested on defendants to plead and prove the contrary. This being a rule of property, the Federal Court was bound thereby.

(*a*) The conveyance from W. H. Rogers et al., to J. F. Rogers and the oil and gas lease to Chandler passed the legal title to the land in controversy.

Swann v. Mills, 219 S. W. 850.
Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69.

(*b*) In Texas the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, and the burden rests upon the holder of an equity or equitable title to show the contrary.

Ritch v. Jarvis, 64 S. W. (2d) 831.
R. B. Godley Lbr. Co. v. Teagarden, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973.
Patty v. Middleton, 82 Tex. 586, 17 S. W. 909.
Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552.

(*c*) Such rule is a rule of property.

Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552.
Harrell v. United Carbon Co. (C. C. A. 5 La.), 52 F. (2d) 790.

(*d*) Such decisions should have been applied by the courts below rather than the Federal rule.

Erie RR. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

Mason v. U. S., 260 U. S. 545, 67 L. Ed. 396.

As heretofore shown, the deed to J. F. Rogers by the other Rogers heirs in 1899 called to begin at the northwest corner of the W. H. Rogers tract No. 1 and ran west 440 yds. to the Wiley Davis northeast corner; thence south 880 yards, east 224 yards, north 10 deg. east 310 yds., east 154 yds. to the W. H. Rogers line; thence north to the beginning. This deed vested in J. F. Rogers the legal title to the land in question. (*Swann v. Mills*, 219 S. W. 850; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69.) Under settled Texas decisions the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, and the burden rests upon the holder of an equity, such as defendants in the case at bar, to prove to the contrary.

In *Swann v. Mills*, 219 S. W. 850, the court said:

"* * * It will be observed that in both deeds—that from Ingraham to Bellamy and from Bellamy to Mills—the west boundary line of the Neil survey is called for, and is the first call mentioned, as the west boundary line of the land conveyed. Neither of those deeds calls for any objects, natural or artificial, which conflict with the true Neil line as originally established. * * * Whether Ingraham intended to do so or not, he

executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed." (p. 852.)

Petitioner holding the title of J. F. Rogers, was therefore entitled to recover unless it and its vendor W. P. Chandler were shown to be purchasers *mala fide*, or that both had notice, or that they failed to pay value. The Texas cases are certain and definite on this point.

Thus in *Ritch v. Jarvis*, 64 S. W. (2d) 831, it was said:

"* * * Certain defendants held under regular mesne conveyances from S. Jarvis. **These defendants are presumptively innocent purchasers. They are the alleged holders of the legal title under regular conveyance from S. Jarvis.** Plaintiffs are the alleged owners of the equitable title, in that their cause of action is a suit in equity to set aside the judgment and recover the legal title. When the holder of the equitable title seeks to recover the legal title from a subsequent purchaser thereof, the burden is on him to plead and prove that such holder of the legal title is not an innocent purchaser." (pp. 834-5.)

And in *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109 (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973), it was said:

"* * * **It is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith.** The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase." (135 S. W. 1114.)

In the Supreme Court the same rule was said in this language:

"The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company." (105 Tex. 620.)

In the very late case of *White v. Hix*, 104 S. W. (2d) 136, it was said:

"*It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity.* Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W. 973; Commonwealth B. & L. Assn. v. Howard (Tex. Civ. App.), 61 S. W. (2d) 546; Moore v. Humble Oil & Ref. Co. (Tex. Civ. App.), 85 S. W. (2d) 943, 944; Tarkenton v. Marshall (Tex. Civ. App.), 91 S. W. (2d) 473. The same rule applies in favor of lien holders. Texas Loan Agency v. Tay-

lor, 88 Tex. 47, 29 S. W. 1057; McAlpine v. Burnett, 23 Tex. 649, 650." (pp. 139-40.)

The early case of *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, is therefore directly in point. There appellant and one John H. Stephens were claiming adversely a tract of land in Montague County, Texas. They compromised their claims, in pursuance of which appellant conveyed to Stephens a portion of the tract. Stephens subsequently sold the land to the defendant Crowell. Appellant sued Crowell claiming that they were mistaken in supposing that the southwest corner of the land was in the line of the Davis Survey for which his deed to Stephens called, and that the call of south 889 varas to the southeast corner of the Hodges Survey on the north boundary line of the Davis survey did not reach the Davis survey by some 79 varas, and that the 79 varas were not covered and included by the deed. This is similar to the case at bar, the call west 440 yards not reaching the Wiley Davis northeast corner by approximately 66 feet. There, as here, the strip between the called distance and the adjoinder called for was the land in controversy. Our Supreme Court held that such mistake would not avail appellant as against Crowell, an innocent purchaser.

III.

The Honorable Circuit Court of Appeals, in holding that there was no showing of consideration for petitioner's lease, is in direct conflict with and disregards the cases of Jones v. Bevier, 59 S. W. (2d) 945, writ denied, and Bailey v. Shell Petroleum Corp., 95 S. W.

(2d) 982, writ denied, as well as various other Texas cases.

(*a*) The recitation of $1.00 paid and the obligation to drill offset wells was under Texas decisions a sufficient showing of consideration.

Jones v. Bevier, 59 S. W. (2d) 945, writ den.
Bailey v. Shell Petroleum Corp., 95 S. W. (2d) 982, writ den.

(*b*) The recitation of $10.00 paid in the W. P. Chandler lease was itself sufficient.

Moss-Tate Inv. Co. v. Owens, 22 S. W. (2d) 1096, writ den.
Russell v. Beckert, 195 S. W. 607.
Luna v. Johnston, 11 S. W. (2d) 1159.
City of San Saba v. Hudson, 95 S. W. (2d) 1312.
Kelley v. Jackson, 6 Pet. 622, 632, 8 L. Ed. 523 (cited in Moss-Tate Inv. Co. v. Owens, supra).

(*c*) The recital of $1.00 paid is in Texas sufficient consideration to support an oil and gas lease.

Emde v. Johnson, 214 S. W. 575, writ den.
Hitson v. Gilman, 220 S. W. 140.
McKay v. Tally, 220 S. W. 167.
McKay v. Lucas, 220 S. W. 172.
McKay v. Kilcrease, 220 S. W. 177.
Johnson v. Russell, 220 S. W. 352, writ den.
Lone Star Gas Co. v. McCullough, 220 S. W. 1114.

Leath v. Humble Oil & Refining Co., 223 S. W. 1022.

Jones v. Bevier, 59 S. W. (2d) 945, writ den.

Bailey v. Shell Pet. Corp., 95 S. W. (2d) 982, writ den.

Quebe v. Gulf C. & S. F. RR. Co., 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545.

(*d*) The Federal Courts also hold the receipt of money in an instrument prima facie evidence of payment of consideration.

New York Life Ins. Co. v. Seifris (C. C. A. Pa.), 46 F. (2d) 391.

Heiskell v. Curtiss (App. D. C.), 259 F. 987.

Stowe v. Belfast Savings Bank, 92 F. 90, aff. (C. C. A.), 92 F. 100.

(*e*) And this seems to be the better rule and supported by the weight of authority.

Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360, and Note.

The lease in question recites a consideration of $10.00 paid, the royalties provided therein, and also contains an unequivocal agreement to offset a well or wells producing oil or gas in paying quantities within 150 feet of and draining the leased premises. (R. p. 142.) The same provisions were held sufficient in *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied, to support the defense of innocent pur-

chaser, though in the *Bailey* Case there was no written obligation to offset, but only an implied obligation. On this point in *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied, the court said:

"On the theory that the lease contract was insufficient to support the defense of innocent purchaser, appellants have presented a most interesting argument, based upon National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979. Because the express consideration was only $1 and an obligation to pay $1,400 in oil, conditioned upon the discovery of oil, appellants contend that the instrument was without consideration, unilateral, and, therefore, optional in its nature. In its legal implications this instrument is on all fours with the lease before us in Jones v. Bevier, 59 S. W. (2d) 945, 948. On the principles of law there announced this instrument conveyed to the original lessee an interest in the land, that is, as said in Jones v. Bevier, the lease 'operated as a present conveyance of the oil and gas under the premises described in the lease, and vested in appellee a determinable fee in the oil and gas in place.' On this construction it follows that appellees, holding under a regular chain of title from appellants, could assert against them the defense of innocent purchaser.

"We say in this case, as we said in Jones v. Bevier, that if the instrument required a consideration one was affirmatively expressed on its face, (a) the $1, *and (b) the implied obligation to drill offset wells."* (p. 985.)

Refusal of a writ of error in these two cases is, under the express provisions of Article 1728 (3 Ver-

non's Ann. Civ. Stats. of 1925, Pamph. Supp: Act of 1927, 40th Leg. p. 214, ch. 144, Sec. 1), an express approval of the opinion, the decision reading:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

The recitation of $10.00 paid in the Chandler lease (R. p. 139) was sufficient evidence of payment of a valuable consideration to support the lease and the defense of innocent purchaser, such being the express holding in the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *Robertson v. Hefley*, 118 S. W. 1159; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, as well as by the cases of *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, and *Jones v. Bevier*, 59 S. W. (2d) 945, above cited, in both of which writs of error were denied.

It is also settled in Texas that $1.00 paid is sufficient consideration for an oil and gas lease. This is held in the following cases *Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W.

140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Co.*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied. These cases are founded on the Supreme Court case of *Quebe v. Gulf, C. & S. F. RR. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545, where the Supreme Court of Texas held that a recital of $1.00 paid was sufficient consideration for the release of damages for personal injuries. Indeed, this is the rule obtaining generally (18 *C. J.* p. 166, Sec. 47) except in Louisiana (*George v. Manhattan Land & Fruit Co.* (C. C. A. 5), 51 F. (2d) 28), and numerous cases could be cited to support such rule. See, also, *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, where a recited consideration of $28.20 was held sufficient to support a lease, which provided that the lease might be surrendered by the payment of $5.00 and all other amounts due at the time of the surrender, the court adverting to the fact that the consideration was satisfactory to the grantors themselves and there could be no reason for the court striking down that part of it.

It is also the rule, supported both by Federal and State authorities, that the written receipt of the consideration is at least prima facie evidence of the payment thereof, and sufficient to require the person attacking the deed or other instrument to prove otherwise; in other words, such acknowledgment is suf-

ficient to discharge the burden of proof in the absence of countervailing testimony. *New York Life Ins. Co. v. Seifris* (C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtis* (App. D. C.), 259 F. 987; *DeArnaud v. U. S.*, 151 U. S. 483, 38 L. Ed. 244; *Russell v. Beckert*, 195 S. W. 607; *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied; *Luna v. Johnston*, 11 S. W. (2d) 350; *Haze v. Home Friendly Ins. Co.* (Md.), 197 A. 632; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. 92 F. 100; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360 and Note. In the last case it was said:

"* * * *In the lease before us we find a valuable consideration paid, as it recites the payment of one dollar down.* * * *Look back at hundreds of deeds through hundreds of years and you will find them stating one dollar as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract.*" (Ann. Cas. 1912B, p. 361.)

In *New York Life Ins. Co. v. Seifris* (C. C. A. 3 Pa.), 46 F. (2d) 391, the court said:

"* * * Something more is required when a party takes the stand to contradict what he has previously, and deliberately, said under his own hand or, as here, under its own seal. A receipt

is a written acknowledgment of payment and therefore evidence of payment. Moreover, it is evidence of a high order because it is the creditor's admission against interest that the debtor has paid his debt." (p. 392.)

In *Heiskell v. Curtis* (App. D. C.), 259 F. 987, it was said:

"The single assignment of error relates to the burden of proof. It is urged by counsel for defendant that the receipted bill is prima facie evidence of payment, and the burden is upon plaintiff to overcome this presumption. It is undoubtedly the law that a receipt is evidence of a high character as to the truth of its recitals, and while it may be explained by parol evidence, the burden of proof rests upon the one attacking it. Jones on Evidence, Sec. 492." (p. 988.)

In the Texas case of *Luna v. Johnston*, 11 S. W. (2d) 350, the rule is thus stated:

"The deed which conveyed the property in question to appellee was executed five years after he and his wife were married, and recited a cash payment of $500. A recitation of payment in a deed is prima facie evidence that the amount named therein was actually paid, and the burden is upon the person attacking same to show a different consideration. Russell v. Beckert (Tex. Civ. App.), 195 S. W. 607; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Whitlock v. Barham & Duncan, 172 Ark. 198, 288 S. W. 4." (p. 351.)

In *City of San Saba v. Hudson*, 95 S. W. (2d) 1312,

appellee sued in trespass to try title to recover certain property in the town of San Saba and the city sought by cross action to recover damages on the general warranty of title contained in its deed. The sole question was whether or not there was in fact any consideration for the deed, and the court said:

> *"The recited consideration of* $2,000 *in the deed is sufficient in law, and the burden was upon appellants, particularly the interveners who were liable on their warranty of title to the city of San Saba, to show that there was in fact no consideration for the deed."* (p. 1313.)

The rule is thus stated in *Corpus Juris* (66 C. J. p. 1129, Sec. 964):

> "But purchasers from a grantee are entitled to accept as true express recitals of a deed to their grantor as to the consideration." (66 C. J. 1129.)

IV.

The Honorable Circuit Court of Appeals, in overruling petitioner's assignments directed at the admission of the evidence of F. E. Rogers that the parties did not intend to include the strip of land in controversy in making the partition in 1899, and in considering and giving effect to such evidence, wholly disregarded applicable decisions of the Texas courts, contrary to the rule adopted by this Honorable Court in the Erie Railroad Co. and Ruhlin cases, supra.

Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ refused.

Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; 85 A. L. R. 391; also other cases cited under First Proposition, pages 19-21 hereof.

On the trial below F. E. Rogers, one of the heirs of Mrs. Louisa Rogers, who joined in the partition deed February 28, 1899, to J. F. Rogers, testified over petitioner's objection to the surveying by Simmons at the time of the partition, and that when Simmons advised them that there was a chain left over on the west, the two oldest brothers said they would just keep that like it was; they were using that for a road at that time of the year; that a stake was placed at the southeast corner and a gearwheel placed there subsequently, etc. (R. pp. 220-223.) This testimony was considered and given effect by the court on the trial below, as shown by his Findings VI to X (R. pp. 61-65). The Circuit Court of Appeals gave effect to such findings and testimony as shown by its opinion on original submission (R. pp. 332-335).

In doing so such Honorable Circuit Court of Appeals very clearly held directly contrary to the case of *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ ref.; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases heretofore cited. In the *Warren* Case, heretofore quoted from, where the controversy involved the inclusion or non-inclusion of a railroad right of way in the description of an oil and gas lease which called to be bounded on the southwest by such right of way, *it was sought to be shown that Mr. Cartwright, the lessor's*

president, went upon the ground and specifically pointed out the tracts to be covered by the lease, which designation did not include the railroad right of way tract. **It was specifically held by the court that such testimony was not admissible, but if received was without probative force in the construction of the lease,** the court citing and relying upon *Rio Bravo Oil Co. v. Weed*, supra, where, it was said, this rule was there given controlling effect. (99 S. W. (2d) 626.)

Of course, rules of evidence in suits in the Federal Courts involving Texas lands are controlled by Texas decisions. (*O'Donnell v. U. S.*, 91 F. (2d) 14; *Olcott v. Bynum*, 17 Wall. (84 U. S.) 44, 21 L. Ed. 570). In *O'Donnell v. U. S.*, supra, the court was considering the admissibility of a copy of a deed from the records of Colusa County in a suit involving the title to California lands, and said

> *"The document should have been excluded, for even had there been a proper search, the copy was not admissible under the California law which controls the admission of evidence in suits in the Federal courts involving title to California lands.*
>
> *"In Olcott v. Bynum* (1872), 17 Wall. (84 U. S.) 44, 21 L. Ed. 570, *the matter under consideration was a land title in North Carolina, and the question was as to the admissibility in evidence of a certified copy of a deed improperly recorded. As to this question the Supreme Court said: 'It is one to be determined by the lex loci rei sitae. It is to be considered solely in the light of the statutes, and adjudications of North Carolina. This court must hold and administer the law upon the subject as if it were sitting as a*

local court of that State.' Olcott v. Bynum, supra, 17 Wall. 44, 57, 21 L. Ed. 570.

"This, of course, is nothing more than a particular application of the general rule that in matters pertaining to real property the law of the situs governs." (pp. 22-23.)

V.

The Honorable Circuit Court of Appeals, in failing and refusing to apply the decisions of the State of Texas concerning the construction of the deed to J. F. Rogers, the lease to W. P. Chandler, the admissibility of evidence to vary the terms of the instruments involved, and in denying to petitioner the benefits of the Texas rule as to the purchase of the legal title and its effect, conflicts with and holds contrary to the decisions of this Honorable Court in Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1187, 114 A. L. R. 1487, and Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

(*a*) The Federal Courts follow rules of evidence in the trial of a case involving the title to Texas lands, that have become settled by the decisions of the Texas courts.

O'Donnell v. U. S. (C. C. A. 9 Cal.), 91 F. (2d) 14, 22.

Olcott v. Bynum, 17 Wall. (84 U. S.) 44, 21 L. Ed. 570.

Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552.

(*b*) Had the presumption of innocence, value

paid and lack of notice attending the purchase of the legal title been adopted by statute of the State of Texas, the United States Courts of course would undoubtedly have given effect thereto.

Parriso v. Towse (C. C. A. 2 N. Y.), 45 F. (2d) 962.

Turner Simplicity Manufacturing Co. v. Bremner (C. C. A. 8 Ia.), 40 F. (2d) 368.

(*c*) The effect of the *Erie* and *Ruhlin* Cases is to apply to rules of law settled by state decisions, the binding force theretofore accorded by the Federal Courts to statutes.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

Unquestionably, had the case below been tried in the Texas courts, effect would have been given to the Texas decisions including the road in controversy as a part of the tract conveyed to J. F. Rogers by his brothers, as the rule is announced in *Mitchell v. Bass*, 26 Tex. 372; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160, by the Texas Commission of Appeals; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases. Just as certainly the testimony of F. E. Rogers in substance that the land in controversy was left out of the partition

intentionally would have been excluded under *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused, and *Rio Bravo Oil Co. v. Weed*, supra. Unquestionably, too, the Texas courts would have applied the Texas rule concerning innocent purchaser, and judgment would necessarily have gone for petitioner. It seems also that had the legal presumptions accorded by the Texas courts to the holder of the legal title, of innocence, good faith and value paid, been adopted by statute, such rules would have been followed by the Federal Courts in this case. (*Turner Simplicity Manufacturing Co. v. Bremner* (C. C. A. 8 Ia.), 40 F. (2d) 368; *Parriso v. Towse* (C. C. A. 2 N. Y.), 45 F. (2d) 962). It is our understanding of the decision of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1187, 114 A. L. R. 1487, that it applies to Federal rules of decision announced by the courts of a state, the rule theretofore followed with reference to state statutes. In that case this court said (304 U. S. 78, 82 L. Ed. 1194):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. **And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.** There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

In *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, a suit in equity, the same rule was announced for guidance in equity cases, the court saying (304 U. S. 202, 82 L. Ed. 1292):

"* * * The decision in Erie R. Co. v. Tompkins, 304 U. S. 64, ante, 1188, 58 S. Ct. 817, 114 A. L. R. 1487, No. 367, decided April 25, 1938, goes further, and settles the question of power. **The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity.** Compare Mason v. United States, 260 U. S. 545, 557, 558, 67 L. Ed. 396, 400, 401, 43 S. Ct. 200." (82 L. Ed. 1292.)

Again in the same case, the court said (304 U. S. 208, 82 L. Ed. 1294):

"Application of the 'State law' to the present case, or any other controversy controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. **The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."**

VI.

The Honorable Circuit Court of Appeals for the Fifth Circuit, in affirming the judgment below, in effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis northeast corner, which would have included the land in controversy, on pleadings and evidence wholly failing to excuse or explain the delay, such release being accorded to the holder of the equitable title or an equitable right as against the holder of the legal title; and in so doing decided an important question of general law in a way wholly untenable within the meaning of Paragraph (b) of Subdivision 5 of Rule 38 of this Honorable Court.

(*a*) The call for the Wiley Davis northeast corner included the land in controversy, and vested in J. F. Rogers, and petitioner as his remote vendee, legal title thereto.

Swann v. Mills, 219 S. W. 850.
Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69.

(*b*) Recordation of the deed and lease affected all parties with notice of the mistake in the description, if mistake there was.

J. R. Watkins Co. v. Gibbs, 66 S. W. (2d) 355.
Central National Bank v. Barclay, 254 S. W. 140.
Vodrie v. Tyman, 57 S. W. 680.

Martinez v. Guiterrez's Heirs, 172 S. W. 766, writ den.
Calhoun v. Burton, 64 Tex. 510.
Boren v. Boren, 85 S. W. 48, writ den.
Ryman v. Petruka, 166 S. W. 711.
Lant v. Manley, 71 F. 7.
Teall v. Schroder, 158 U. S. 172, 39 L. Ed. 938.

(*c*) Under the statutes of limitation of the State of Texas, an action to reform a deed must be brought within four years after the cause of action accrues.

Art. 5529, 16 *Vernon's Rev. Civ. Stats.* 1925.

(*d*) The doctrine of equitable laches also applies in Texas to such situations.

Connolly v. Hammond, 51 Tex. 635.
Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co. (C. C. A. 5 Tex.), 279 F. 977.

As heretofore shown, the description involved begins at the northwest corner of the W. H. Rogers Tract No. 1 and runs west 440 yards to the Wiley Davis northeast corner; thence south, east, north 12 deg. E, and East to the W. H. Rogers line and north to the beginning. (This deed was dated February 28, 1899, and recorded February 10, 1900, R. p. 205.) The oil and gas lease to W. P. Chandler was dated October 20, 1930, and recorded November 18, 1930 (R. p. 138), the description being identical with the J. F. Rogers deed except that it excepted the 2-acre

tract out of the northeast corner theretofore conveyed by the widow and children of J. F. Rogers to R. M. Wood in 1917 (R. pp. 150-151). This 2-acre tract included the north end of the strip claimed by defendants (see map following p. 16 hereof).

Wiley Davis owned the land adjoining the Mrs. Louisa Rogers land on the west, and the northeast corner of the Wiley Davis tract of land was a well established and well marked and identified corner, witnessed by a pine tree and the east line of the Davis tract was well marked by marked trees. (See testimony of F. E. Rogers, J. E. Sport and Wiley Davis, next hereinafter referred to.)

Petitioner's original petition was filed December 18, 1934 (R. p. 13), and the answer and cross action of the defendants alleging a mistake in the call for the Wiley Davis northeast corner (R. p. 34) was filed January 27, 1936 (R. p. 43).

The 66.89 foot strip of land along the west side of the J. F. Rogers tract No. 2 was adjudged to defendants as not being included in the deed to J. F. Rogers or the lease to W. P. Chandler (R. p. 54-55).

The court found that the call for the Wiley Davis northeast corner in the deed to J. F. Rogers was inserted by mistake. (16th Finding, R. p. 68.) F. E. Rogers, one of the grantors in the deed to J. F. Rogers, testified that he knew where Wiley Davis lived and where the pine tree stood at his northeast corner, and that the old road jogged around the pine tree. He also knew where the Davis east line was and it was marked by marked trees which were cut down

when he built the road. (R. pp. 225-226.) J. E. Sport, a witness for defendants, also testified to the pine tree at the northeast corner of the Wiley Davis tract, and that such pine tree represented the dividing line of the survey at the north. (R. p. 238.)

Although defendants allege the call for the Wiley Davis northeast corner was included by mistake (R. pp. 30-31) no excuse for the long delay in seeking a reformation of the instruments involved is contained in their answer and cross action. (R. pp. 28-43.)

Under *Swann v. Mills*, 219 S. W. 850, and *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, it is very plain that the legal title to the property involved in this suit vested in J. F. Rogers and through him in petitioner. Such deed must necessarily have been given effect, unless reformed, and the judgment below in adjudging to defendants the tract of land in controversy necessarily had the effect of so doing. Defendants and their predecessors in title were affected with notice of the mistake by the record of the deed and lease and beyond question defendants were not entitled to equitable relief in the way of reformation after a lapse of over thirty years in one instance and over four years in another. The doctrine of laches, if nothing else, would bar such right. (*Connolly v. Hammond*, 51 Tex. 635; *Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.* (C. C. A. 5), 279 F. 977.)

VII.

It is respectfully prayed that writ of certiorari be granted and that upon hearing of this cause, the judgments below be reversed and judgment rendered for petitioner for the land involved, together with such other relief as it may be entitled to, either at law or in equity.

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DAVID B. TRAMMELL, one of counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

DAVID B. TRAMMELL.

In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY,
Petitioner

v.

B. P. DUNLAP, ET AL.

No._____

Receipt of a copy of the petition for certiorari and supporting brief and the record is hereby acknowledged, and further notice of the filing and presentation of such petition and brief is waived and the Honorable Clerk of the Supreme Court may submit same within twenty days from the date of filing as provided by Paragraph 3 of Rule 38 of the Supreme Court of the United States.

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